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Attorneys for Defendant and Counter-Claimant
 ABAXIS, INC.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION

BV RIGHTS ANSTALT, a Lichtenstein
 establishment,

Plaintiff,

v.

ABAXIS, INC., a California corporation,

Defendants.

CASE NO. C 04-4839 SC

**STIPULATION AND ~~PROPOSED~~
 ORDER GRANTING ABAXIS, INC.
 LEAVE TO FILE A FIRST AMENDED
 ANSWER TO THIRD AMENDED
 COMPLAINT & AFFIRMATIVE
 DEFENSES**

Judge: Samuel Conti
 Action filed: November 12, 2004

ABAXIS, INC., a California corporation,

Counter-Claimant,

v.

BV RIGHTS ANSTALT, a Lichtenstein
 establishment,

Counter-Defendant.

WHEREAS, discovery in this matter is still in its early stages;

WHEREAS, neither party will be prejudiced by Abaxis, Inc. ("Abaxis") filing an
 amended answer to the Third Amended Complaint of BV Rights Anstalt ("BV Rights");

WHEREAS, the parties stipulate to the filing of Abaxis' First Amended Answer to Third

1 Amended Complaint & Affirmative Defenses ("Amended Answer"), in the form attached hereto
2 as Exhibit 1;

3 IT IS THEREFORE STIPULATED AND AGREED by and between BV Rights on the
4 one hand, and Abaxis on the other hand, by and through their respective counsel, as follows:
5 Abaxis shall file its Amended Answer within five days of the Court's entry of the order herein.

6
7 Dated: November 2, 2005

LUSCUTOFF, LENDORMY & ASSOCIATES

8
9 By 

JEAN-YVES LENDORMY
Attorneys for Plaintiff and Counter-Defendant
BV RIGHTS ANSTALT

10
11 Dated: November 3, 2005

DLA PIPER RUDNICK GRAY CARY US LLP

12
13 By 

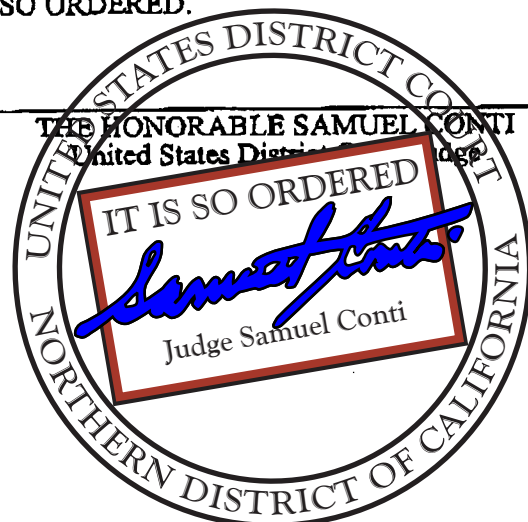
RICHARD I. YANKWICH
Attorneys for Defendant and Counter-Claimant
ABAXIS, INC.

14
15 **ORDER**

16
17 IT IS HEREBY ORDERED THAT Abaxis shall file the Amended Answer, in the form
18 attached hereto as Exhibit 1, within five days of the entry of the Court's order.

19 PURSUANT TO STIPULATION, IT IS SO ORDERED.

20 Dated: November 3, 2005



DLA PIPER RUDNICK
GRAY CARY US LLP

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STIPULATION AND [PROPOSED] ORDER RE: ABAXIS' LEAVE TO FILE FIRST
AMENDED ANSWER / CASE NO. C 04-04839 SC

EXHIBIT 1

RICHARD I. YANKWICH (Bar No. 089924)
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ABAXIS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BV RIGHTS ANSTALT, a Lichtenstein
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Plaintiff,

v.

ABAXIS, INC., a California corporation,
Defendants.

ABAXIS, INC., a California corporation,
Counter-Claimant,

v.

BV RIGHTS ANSTALT, a Lichtenstein
establishment,

Counter-Defendant.

CASE NO. C 04-4839 SC

**FIRST AMENDED ANSWER TO THIRD
AMENDED COMPLAINT &
AFFIRMATIVE DEFENSES**

[DEMAND FOR JURY]

Complaint Filed: November 12, 2004

Defendant and Counter-Claimant Abaxis, Inc. ("Abaxis") answers the Third Amended
Complaint ("TAC") of Plaintiff and Counter-Defendant BV Rights Anstalt ("BV Rights") as
follows:

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///

JURISDICTION, VENUE, AND INTRA-DISTRICT ASSIGNMENT

1. The allegations in Paragraph 1 of the TAC state legal conclusions to which no response is required. Abaxis denies the remaining allegations in Paragraph 1 of the TAC.

2. The allegations in Paragraph 2 of the TAC state legal conclusions to which no response is required. Abaxis denies that this Court has pendent jurisdiction over Count Three, Breach of Contract, pursuant to 28 U.S.C. §1338(b). Abaxis denies the remaining allegations in Paragraph 2 of the TAC.

3. The allegations in Paragraph 3 of the TAC state legal conclusions to which no response is required. Abaxis is without knowledge or information sufficient to form a belief as to the truth of the allegation that the matter in controversy exceeds one hundred and fifty thousand dollars (\$150,000) and based thereon denies such allegation. Abaxis denies the remaining allegations in Paragraph 3 of the TAC.

4. The allegations in Paragraph 4 of the TAC state legal conclusions to which no response is required. Abaxis admits it is a corporation. Abaxis denies the remaining allegations in Paragraph 4 of the TAC.

PARTIES

5. Abaxis is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the TAC and based thereon denies such allegations.

6. Abaxis admits that it is a corporation incorporated in the State of California and is qualified to do business and is doing business in the State of California. Abaxis' principal executive offices are located at 3240 Whipple Road, Union City, California. Abaxis denies the remaining allegations in Paragraph 6 of the TAC.

FACTS

7. Abaxis is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the TAC and based thereon denies such allegations.

8. Abaxis is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the TAC and based thereon denies such allegations.

1 9. Abaxis is without knowledge or information sufficient to form a belief as to the truth
2 of the allegations contained in Paragraph 9 of the TAC and based thereon denies such allegations.

3 10. Abaxis is without knowledge or information sufficient to form a belief as to the truth
4 of the allegations contained in Paragraph 10 of the TAC and based thereon denies such
5 allegations.

6 11. Abaxis is without knowledge or information sufficient to form a belief as to the truth
7 of the allegations contained in Paragraph 11 of the TAC and based thereon denies such
8 allegations.

9 12. Abaxis is without knowledge or information sufficient to form a belief as to the truth
10 of the allegation that "Abaxis would purchase from the various manufacturers of these products"
11 and based thereon denies such allegation. Abaxis alleges that on or about March 11, 1999,
12 Abaxis entered into a Distribution Agreement with Melet Schloesing Laboratoires ("Melet") (the
13 "Melet Agreement"). Abaxis further alleges that, pursuant to the Melet Agreement, Abaxis and
14 Melet entered into a non-exclusive distribution arrangement whereby Abaxis distributed Melet's
15 blood hematological analyzing device ("Melet Analyzers"). Additionally, Abaxis alleges that it
16 entered into an agreement with BV Rights ("BV Rights Agreement") on or about August 16,
17 1999, whereby Abaxis agreed to pay BV Rights a certain fee for each Melet Analyzer delivered to
18 Abaxis. Abaxis denies the remaining allegations in Paragraph 12 of the TAC.

19 13. Abaxis alleges that it entered into an agreement titled "Patent and Copyright Fee
20 Agreement" with BV Rights on or about August 16, 1999. Abaxis alleges that it entered into an
21 agreement titled "Amendment to 'BV Rights'/'Abaxis'" on or about December 1, 2000. Abaxis
22 specifically denies that the BV Rights Agreement required Abaxis to pay a licensing fee to BV
23 Rights for each "Patented Device" delivered to Abaxis. Abaxis denies the remaining allegations
24 in Paragraph 13 of the TAC.

25 14. Abaxis denies the allegations in Paragraph 14 of the TAC.

26 15. The allegations in Paragraph 15 of the TAC state legal conclusions to which no
27 response is required. Abaxis alleges that it lawfully created a compatible "smart" card for use
28 with the Melet Analyzers. Abaxis denies the remaining allegations contained in Paragraph 15 of

1 the TAC.

2 16. Abaxis admits that it caused the manufacture and distribution of reagents in the
3 United States, Germany, the United Kingdom, the Middle East, and Australia for use with the
4 Melet Analyzers. Abaxis further admits that it purchased and distributed “smart” cards in the
5 United States, Germany, the United Kingdom, the Middle East, and Australia for use with the
6 Melet Analyzers. Abaxis specifically denies that such activities are unfair or illegal. Abaxis
7 denies the remaining allegations in Paragraph 16 of the TAC.

8 **COUNT ONE**

9 **[Copyright Infringement – Copyright Act of 1976]**

10 **[17 U.S.C. §§101, *et seq.*]**

11 17. In response to Paragraph 17 of the TAC, Abaxis repeats and realleges its responses to
12 Paragraphs 1-16, inclusive, as though set forth in full herein.

13 18. Abaxis is without knowledge or information sufficient to form a belief as to the truth
14 of the allegations contained in Paragraph 18 of the TAC and based thereon denies such
15 allegations.

16 19. The allegations in Paragraph 19 of the TAC state legal conclusions to which no
17 response is required. Abaxis is without knowledge or information sufficient to form a belief as to
18 the truth of the remaining allegations contained in Paragraph 19 of the TAC and based thereon
19 denies such allegations.

20 20. The allegations in Paragraph 20 of the TAC state legal conclusions to which no
21 response is required. Nonetheless, Abaxis denies the allegations of Paragraph 20. Abaxis
22 specifically denies that its activities are unlawful.

23 21. The allegations in Paragraph 21 of the TAC state legal conclusions to which no
24 response is required. Nonetheless, Abaxis denies the allegations of Paragraph 21. Abaxis
25 specifically denies that its activities are unlawful.

26 22. The allegations in Paragraph 22 of the TAC state legal conclusions to which no
27 response is required. Nonetheless, Abaxis denies the allegations of Paragraph 22. Abaxis
28 specifically denies any allegation that Abaxis has infringed, or is infringing, BV Rights’ allegedly

1 copyrighted software. Abaxis specifically denies that it committed any wrongful act.

2 23. The allegations in Paragraph 23 of the TAC state legal conclusions to which no
3 response is required. Nonetheless, Abaxis denies the allegations of Paragraph 23. Abaxis
4 specifically denies any allegation that Abaxis has infringed, or is infringing, BV Rights' allegedly
5 copyrighted software. Abaxis specifically denies that its conduct has prejudiced BV Rights.

6 24. The allegations in Paragraph 24 of the TAC state legal conclusions to which no
7 response is required. Nonetheless, Abaxis denies the allegations of Paragraph 24. Abaxis
8 specifically denies any allegation that Abaxis has infringed, or is infringing, BV Rights' allegedly
9 copyrighted software. Abaxis specifically denies that it committed any wrongful act.

10 25. The allegations in Paragraph 25 of the TAC state legal conclusions to which no
11 response is required. Nonetheless, Abaxis denies the allegations of Paragraph 25. Abaxis
12 specifically denies any allegation that Abaxis has infringed, or is infringing, BV Rights' allegedly
13 copyrighted software. Abaxis specifically denies that it committed any wrongful act. Abaxis
14 denies that it has caused any damage to BV Rights.

15 26. The allegations in paragraph 26 of the TAC state legal conclusions to which no
16 response is required. Nonetheless, Abaxis denies the allegations of Paragraph 26 of the TAC.
17 Abaxis specifically denies any allegation that Abaxis has infringed, or is infringing, BV Rights'
18 allegedly copyrighted software. Abaxis specifically denies that it committed any wrongful act.
19 Abaxis denies that it has caused any damage to BV Rights.

20 **COUNT TWO**

21 **[Copyright Infringement – Digital Millennium Copyright Act]**

22 **[17 U.S.C. §§1201, *et seq.*]**

23 27. In response to Paragraph 27 of the TAC, Abaxis repeats and realleges its responses to
24 Paragraphs 1-16, inclusive, as though set forth in full herein.

25 28. The allegations in Paragraph 28 of the TAC state legal conclusions to which no
26 response is required. Nonetheless, Abaxis denies the allegations of Paragraph 28. Abaxis
27 specifically denies that its conduct violates the Digital Millennium Copyright Act.

28

29. The allegations in Paragraph 29 of the TAC state legal conclusions to which no response is required. Nonetheless, Abaxis denies the allegations of Paragraph 29. Abaxis specifically denies that its conduct violates the Digital Millennium Copyright Act.

30. The allegations in Paragraph 30 of the TAC state legal conclusions to which no response is required. Nonetheless, Abaxis denies the allegations of Paragraph 30. Abaxis specifically denies any allegation that Abaxis has infringed, or is infringing, BV Rights' allegedly copyrighted software.

31. The allegations in Paragraph 31 of the TAC state legal conclusions to which no response is required. Nonetheless, Abaxis denies the allegations of Paragraph 31 of the TAC. Abaxis specifically denies any allegation that Abaxis has infringed, or is infringing, BV Rights' allegedly copyrighted software. Abaxis denies that it has caused any damage to BV Rights.

32. The allegations in Paragraph 32 of the TAC state legal conclusions to which no response is required. Nonetheless, Abaxis denies the allegations of Paragraph 32 of the TAC. Abaxis specifically denies that it committed any wrongful act. Abaxis denies that it has caused any damage to BV Rights.

COUNT THREE

[Breach of Contract]

33. In response to Paragraph 33 of the TAC, Abaxis repeats and realleges its responses to Paragraphs 1-16, inclusive, as though set forth in full herein.

34. Abaxis denies the allegations of Paragraph 34 of the TAC.

35. Abaxis denies the allegations of Paragraph 35 of the TAC.

36. Abaxis denies the allegations of Paragraph 36 of the TAC. Abaxis specifically denies that it committed any wrongful act.

37. Abaxis denies the allegations of Paragraph 37 of the TAC. Abaxis specifically denies that it committed any wrongful act. Abaxis denies that it has caused any damage to BV Rights.

COUNT FOUR**[Unfair Business Practice]**

38. In response to Paragraph 38 of the TAC, Abaxis repeats and realleges its responses to Paragraphs 1-16, inclusive, and Paragraphs 34-36, inclusive, as though set forth in full herein.

39. The allegations in Paragraph 39 of the TAC state legal conclusions to which no response is required. Nonetheless, Abaxis denies the allegations of Paragraph 39 of the TAC. Abaxis specifically denies that it committed any wrongful act.

40. The allegations in Paragraph 40 of the TAC state legal conclusions to which no response is required. Nonetheless, Abaxis denies the allegations of Paragraph 40 of the TAC. Abaxis specifically denies that it committed any wrongful act. Abaxis denies that it has caused any damage to BV Rights.

41. The allegations in Paragraph 41 of the TAC state legal conclusions to which no response is required. Nonetheless, Abaxis denies the allegations of Paragraph 41 of the TAC. Abaxis specifically denies that it committed any wrongful act. Abaxis denies that it caused any damage to BV Rights.

42. Abaxis denies all allegations in the TAC unless those allegations are expressly admitted in the Answer. Abaxis specifically denies that it committed any wrongful act. Abaxis denies that it has caused any damage to BV Rights.

AFFIRMATIVE DEFENSES**FIRST AFFIRMATIVE DEFENSE****(Failure to State a Claim)**

1. BV Rights' TAC, and each purported claim therein, fails to state facts sufficient to constitute a claim upon which relief may be granted against Abaxis.

SECOND AFFIRMATIVE DEFENSE**(Copyright Invalidity)**

2. BV Rights' copyright infringement claims are barred on the grounds that its copyrights are invalid for lack of originality.

THIRD AFFIRMATIVE DEFENSE

(Lack of Copyright Ownership)

3. BV Rights' copyright infringement claims are barred on the grounds that BV Rights lacks copyright ownership in the subject matter claimed to be copyrighted.

FOURTH AFFIRMATIVE DEFENSE

(Copyright Misuse)

4. BV Rights' TAC, and each purported claim therein, is barred because of BV Rights' copyright misuse.

FIFTH AFFIRMATIVE DEFENSE

(Fair Use)

5. BV Rights' TAC, and each purported claim therein, is barred by the fair use doctrine.

SIXTH AFFIRMATIVE DEFENSE

(De Minimis Copying)

6. BV Rights' copyright infringement claims are barred by the de minimis copying doctrine.

SEVENTH AFFIRMATIVE DEFENSE

(Reverse Engineering 17 U.S.C. § 1201(f))

7. BV Rights' TAC, and each purported claim therein, is barred by the statutory exception provided by 17 U.S.C. § 1201(f) for reverse engineering.

EIGHTH AFFIRMATIVE DEFENSE

(Unclean Hands)

8. BV Rights' TAC, and each purported claim therein, is barred pursuant to the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

(Standing)

9. BV Rights' TAC, and each purported claim therein, is barred because of lack of standing.

TENTH AFFIRMATIVE DEFENSE

(Privilege of Competition)

10. BV Rights' unfair business practices claim is barred by the privilege of competition based on the fact that Abaxis did not use wrongful means to advance an interest in competing in the free market.

ELEVENTH AFFIRMATIVE DEFENSE

(Laches)

11. BV Rights has delayed, for an unreasonable period of time, asserting its claims against Abaxis and those delays have prejudiced Abaxis. BV Rights' TAC, and each purported claim therein, is therefore barred by the doctrine of laches.

TWELFTH AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

12. BV Rights has failed to act reasonably to mitigate or to minimize the damages it has alleged.

THIRTEENTH AFFIRMATIVE DEFENSE

(Estoppel)

13. BV Rights is estopped by its own acts or omissions from recovery against Abaxis for the alleged loss, injury or damage suffered by it, if any.

FOURTEENTH AFFIRMATIVE DEFENSE

(Waiver)

14. BV Rights' TAC, and each purported claim therein, is barred pursuant to the doctrine of waiver.

FIFTEENTH AFFIRMATIVE DEFENSE

(Innocent Intent)

15. BV Rights' copyright infringement claims are barred and/or BV Rights' remedies are limited on grounds that Abaxis had innocent intent in the alleged acts in BV Rights' TAC.

SIXTEENTH AFFIRMATIVE DEFENSE

(License)

16. BV Rights' TAC, and each purported claim therein, is barred because Abaxis had a license to copy and/or use any copyrights alleged in the TAC.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Adequate Remedies at Law)

17. BV Rights' claims for injunctive or other equitable relief are barred because BV Rights has an adequate remedy at law.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Failure to Join an Indispensable Party)

18. BV Rights' TAC, and each purported claim therein, is barred for failure to join an indispensable party.

NINETEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

19. BV Rights' TAC, and each purported claim therein, is barred by the statute of limitations.

TWENTIETH AFFIRMATIVE DEFENSE

(Acts of Third Parties)

20. Any damages sustained by BV Rights were proximately caused, in whole or in part, by the negligent conduct, intentional conduct, and/or intervening conduct of persons or entities other than Abaxis, for which Abaxis is not liable or responsible.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Preemption)

21. BV Rights' California unfair business practices claim is preempted by federal copyright law.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(No Meeting of the Minds)

22. Each and every alleged claim for relief against Abaxis which relies on the existence of any purported contract, other than those whose existence Abaxis has admitted herein, is barred in whole or in part because there was no meeting of the minds on the terms alleged.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Breach of Covenant of Good Faith and Fair Dealing)

23. Each and every alleged claim for relief against Abaxis which relies on the existence of any purported contract is barred in whole or in part because BV Rights breached the covenant of good faith and fair dealing of any such purported contract.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Failures of Conditions Precedent, Concurrent and/or Subsequent)

24. Each and every alleged claim for relief against Abaxis which relies on the existence of any contract is barred in whole or in part by failures of conditions precedent, concurrent, and/or subsequent.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Failure to Perform Obligations under Contract)

25. Abaxis was excused from performing any alleged obligations under any purported contract due to BV Rights' failure to perform its obligations under the alleged contract.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Offset)

26. To the extent that any money is determined to be owed by Abaxis to BV Rights, such debt must be offset by amounts which BV Rights owes to Abaxis.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Statute of Frauds)

27. BV Rights' breach of contract claim is barred by the statute of frauds to the extent that it is based upon an oral contract.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Failure to Exhaust Contractual Remedies)

28. BV Rights' TAC, and each purported claim therein, is barred because BV Rights failed to exhaust the remedies provided for in the contract.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(Lack of Consideration)

29. BV Rights' TAC, and each purported claim therein, is barred by a lack and/or failure of consideration.

THIRTIETH AFFIRMATIVE DEFENSE

(Parol Evidence Rule)

30. Insofar as BV Rights' TAC, and/or certain of the claims alleged therein, seeks relief based upon certain oral statements, representations, and/or agreements made prior to, or contemporaneous with, the integrated, written agreement of the parties, the TAC, and those purported claims, are barred by the Parol Evidence rule.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Uncertainty)

31. Each and every alleged claim for relief against Abaxis which relies on the existence of any contract, other than those whose existence Abaxis has admitted herein, is barred in whole or in part due to the uncertainty of the terms and conditions of any alleged contract or portion thereof.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Cancellation/Termination)

32. BV Rights' TAC, and each purported claim therein, is barred in whole or in part, in that BV Rights, by its own acts, errors and omissions, has caused the alleged agreement or account with Plaintiff to be terminated or cancelled.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(Unjust Enrichment)

33. BV Rights' TAC, and each purported claim therein, is barred in whole or in part

1 because BV Rights would be unjustly enriched if it is permitted to recover on the TAC.

2 **THIRTY-FOURTH AFFIRMATIVE DEFENSE**

3 **(Intermediate Copying of a Computer Program 17 U.S.C. § 117(a))**

4 34. BV Rights' copyright infringement claims are barred by 17 U.S.C. § 117(a), which
5 permits the creation of a new copy or adaptation that is created as an essential step in the
6 utilization of the computer program in conjunction with a machine.

7 **PRAYER**

8 Wherefore, Abaxis prays for relief as follows:

- 9 1. That BV Rights take nothing by reason of the TAC;
10 2. That the TAC be dismissed with prejudice;
11 3. That Abaxis be awarded attorneys' fees;
12 4. That Abaxis be awarded cost of suit; and
13 5. For such other and further relief as the Court deems just and proper.

14 **JURY DEMAND**

15 Abaxis demands trial by jury of all claims triable to a jury in this action.

16
17 Dated: November ___, 2005

18 DLA PIPER RUDNICK GRAY CARY US LLP

19 By _____

20 RICHARD I. YANKWICH
21 DIANA NG FUNG
22 RAJIV DHARNIDHARKA
23 Attorneys for Defendant and Counter-Claimant
24 ABAXIS, INC.
25
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27
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